

September 24, 2004

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-35 is available for public comments under this procedure. It was requested by counsel, Marc E. Elias, on behalf of Kerry-Edwards 2004, Inc., and Kerry-Edwards 2004 General Election Legal and Accounting Compliance (GELAC) Fund.

Proposed Advisory Opinion 2004-35 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 30, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on September 29, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

### **CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-35, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

### **MAILING ADDRESSES**

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 24, 2004

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Mai T. Dinh  
Assistant General Counsel

J. Duane Pugh Jr.  
Senior Attorney

Subject: Draft AO 2004-35

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 30, 2004.

Attachment

1   ADVISORY OPINION 2004-35

2   Marc E. Elias, Esq.  
3   Perkins Coie  
4   607 14th Street, NW  
5   Washington, DC 20005-2011

**DRAFT**

6   Dear Mr. Elias:

7           This responds to your letter dated September 7, 2004, on behalf of Senator John  
8   Kerry, Senator John Edwards, Kerry-Edwards 2004, Inc., and the Kerry-Edwards 2004  
9   General Election Legal and Accounting Compliance Fund (the “GELAC”), concerning  
10   the application of the Federal Election Campaign Act of 1971, as amended (the “Act”),  
11   and Commission regulations to whether the GELAC may pay any recount expenses that  
12   might arise.

13   ***Background***

14           Kerry-Edwards 2004, Inc. (“Kerry-Edwards”), is the authorized committee of  
15   presidential and vice presidential candidates Senators Kerry and Edwards. Kerry-  
16   Edwards is a recipient of public funds under the Presidential Election Campaign Fund  
17   Act, and it has established the GELAC pursuant to 11 CFR 9003.3. Kerry-Edwards  
18   inquires about the use of the GELAC to pay recount expenses, which it anticipates would  
19   include legal fees and expenses, fees for payment of staff, expenses for administrative  
20   overhead and office equipment. Thus, recount expenses would be incurred solely with  
21   respect to recount efforts related to the November 2004 presidential election.

22   ***Legal Analysis and Conclusions***

23           The requestors seek the Commission’s opinion on two alternative questions.

24           (1)   May contributions to the GELAC be used to pay recount expenses?

(2) Alternatively, if GELAC contributions may not be used to pay all recount expenses, what additional restrictions, if any, apply to the raising and spending of funds to be used to pay for recount expenses?

With regard to the first question, the Commission concludes that using permissible contributions made to the GELAC for recount expenses arising from the November 2004 presidential general election is consistent with 11 CFR 9003.3(a)(2). While this regulation does not specifically refer to such recount expenses, it does provide that GELAC funds may be used for certain legal and accounting compliance expenses and winding down expenses, which are expenses “associated with the termination of the candidate’s general election campaign.” *See* 11 CFR 9003.3(a)(2)(i)(A), 9003.3(a)(2)(i)(I), and 9004.11(a). The Commission agrees that the types of recount expenses you would like to pay using GELAC funds generally fit within the permissible uses of GELAC funds specified in 11 CFR 9003.3(a)(2).

All receipts and disbursements from the GELAC account must be reported in a separate report in accordance with 11 CFR 9006.1(b)(2). 11 CFR 9003.3(a)(3)(ii). These reporting requirements apply to GELAC receipts and disbursements related to any recount of the presidential election. Further, all GELAC receipts must also comply with the amount limitations and source prohibitions of FECA. *See* 11 CFR 9003.3(a)(1)(i).

Regulations promulgated by the Commission prior to the enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (“BCRA”), address receipts and disbursements related to a recount of the results of a Federal election. 11 CFR 100.91 and 100.151. These recount rules expressly bar the receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114

(corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

Given that the GELAC may not accept any impermissible funds, these recount rules are not implicated by your proposed activity.

Because the Commission concludes that GELAC funds may be used for recount expenses associated with the presidential election, this advisory opinion does not address any of the alternative questions raised in your advisory opinion request, which are premised on a negative answer to your question regarding the use of GELAC funds.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for their proposed activity.

Sincerely,

Bradley A. Smith  
Chairman